(2)

No. 04-1544

IN THE

Supreme Court of the United States

VICKIE LYNN MARSHALL,

Petitioner,

v.

E. PIERCE MARSHALL,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

THOMAS C. GOLDSTEIN
GOLDSTEIN & HOWE, P.C.
4607 Asbury Place, N.W.
Washington, DC 20016
(202) 237-7543

G. ERIC BRUNSTAD, JR.
Counsel of Record
RHEBA RUTKOWSKI
RENEE M. DAILEY
BINGHAM MCCUTCHEN LLP
One State Street
Hartford, CT 06103
(860) 240-2700

Attorneys for Respondent

QUESTION PRESENTED

Whether, on the facts of this case, the "probate exception" bars the exercise of bankruptcy jurisdiction over a cause of action that, under applicable Texas probate law, Petitioner was required to assert, and actually did assert unsuccessfully, in a Texas probate proceeding that Petitioner herself initiated prior to commencing her bankruptcy case.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

PRELIMINARY STATEMENT 1

STATEMENT OF THE CASE 3

The Probate Proceedings 4

The Bankruptcy Proceedings 9

The District Court Proceedings 11

The Decision of the Court of Appeals 12

REASONS FOR DENYING THE PETITION 14

A. The Decision Below Comports With This Court's Precedents 15

1 Texas probate law and Vickie's Claim 15

2. The decision below comports with *Sutton* and *Markham* 18

3. This Court has applied the Probate Exception in bankruptcy 21

4. Vickie's claim is not *inter partes* and the Probate Exception applies to her gift theory 23

B. The Decision Below Does Not Conflict With The Decisions Of Other Courts of Appeals 25

C. Vickie's Claim Is Barred In Any Event 29

CONCLUSION 30

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Allen v. McCurry, 449 U.S. 90 (1980) 30

Armstrong v. Lear, 25 U.S. 169 (1827) 15

Breaux v. Dilsaver, 254 F.3d 533 (5th Cir. 2001) 27

Byers v. McAuley, 149 U.S. 608 (1893) 15

In re Broderick's Will, 88 U.S. 503 (1874) 15, 17

Dragan v. Miller, 679 F.2d 712 (7th Cir. 1982) 23

Elk Grove Unified Sch. Dist. v. Newdow
542 U.S. 1, 124 S. Ct. 2301 (2004) 25

Farrell v. O'Brien, 199 U.S. 89 (1905) 15, 23, 24

Goerg v. Parungao (In re Goerg), 844 F.2d 1562
(11th Cir. 1988) 25, 26

Golden v. Golden, 382 F.3d 348 (3d Cir. 2004) 27

Harris v. Zion Sav. Bank & Trust Co.,
317 U.S. 447 (1943) 12, 15, 21, 22

Harrold v. First Nat'l Bank of Fort Worth,
3 F. Supp. 882 (N.D. Tex. 1950) 30

Hopkins v. Lee, 6 Wheat. 109 (1821) 30

Lepard v. NBD Bank, 384 F.3d 232 (6th Cir. 2004) 28

Mangieri v. Mangieri, 226 F.3d 1 (1st Cir. 2000) 27

Markham v. Allen, 326 U.S. 490 (1946)..... 15, 19, 20, 21, 26, 27

McKibben v. Chubb, 840 F.2d 1525 (10th Cir. 1988) 23, 28, 29

Moore v. Graybeal, 843 F.2d 706 (3d Cir. 1988)..... 23, 27

Moser v. Pollin, 294 F.3d 335 (2d Cir. 2002)..... 20, 23, 26

Princess Lida of Thurn & Taxis v. Thompson, 305 U.S. 456 (1939)..... 13

San Remo Hotel, L.P. v. City & County of San Francisco 125 S. Ct. 2491 (2005)..... 30

Sianis v. Jensen, 294 F.3d 994 (8th Cir. 2002)..... 29

Storm v. Storm, 328 F.3d 941 (7th Cir. 2003)..... 23, 27, 28

Sutton v. English, 246 U.S. 199 (1918)..... 12, 15, 16, 18, 19, 20, 21, 24

Waterman v. Canal-Louisiana Bank & Trust Co., 15 U.S. 33 (1909)..... 24

STATE CASES

Bailey v. Cherokee County Appraisal Dist., 862 S.W.2d 581 (Tex. 1993)..... 16

English v. Cobb, 593 S.W.2d 674 (Tex. 1979)..... 16, 18

Falderbaum v. Lowe, 964 S.W.2d 744 (Tex. App. 1998)..... 16

In re Graham, 971 S.W.2d 56 (Tex. 1998)..... 16

Ladehoff v. Ladehoff, 436 S.W.2d 334 (Tex. 1968) 17

Maxfield v. Terry, 885 S.W.2d 216 (Tex. App. 1994)..... 17

Mooney v. Harlin, 622 S.W.2d 83 (Tex. 1981) 17

Neill v. Yett, 746 S.W.2d 32 (Tex. App. 1988).....8, 17

Perfect Union Lodge of San Antonio v. Interfirst Bank of San Antonio,
48 S.W.2d 218 (Tex. 1988).....16, 17

Pullen v. Swanson, 667 S.W.2d 359
Tex. App. 1984) 16

In re Ramsey, 28 S.W.3d 58 (Tex. App. 2000).....16, 18

Thompson v. Deloitte & Touche,
02 S.W.2d 13 (Tex. App. 1995)..... 8, 17

Tri-State Chems., Inc. v. Western Organics, Inc.,
3 S.W.3d 189 (Tex. App. 2002)..... 17

FEDERAL STATUTES

28 U.S.C. § 1738 (2000 & Supp. II 2003)..... 30

STATE STATUTES

TEX. PROB. CODE ANN. §§ 1 *et seq.* (Vernon 1999) 16

TEX. PROB. CODE ANN. § 5 (Vernon 1999)..... 6

TEX. PROB. CODE ANN. § 5(e)
Vernon 1999)..... 16, 17

TEX. PROB. CODE ANN. § 5(e) (Vernon 1999)..... 17

TEX. PROB. CODE ANN. § 5A (Vernon 1999)..... 6

TEX. PROB. CODE ANN. § 5A(a) (Vernon 1999) 6, 16

TEX. PROB. CODE ANN. § 5A(c)(2) (Vernon 1999)....16, 17

TEX. PROB. CODE ANN. § 5A(b) (Vernon 1999).... 6, 16, 17

TEX. PROB. CODE ANN. § 5B
(Vernon 1999)..... 16

PRELIMINARY STATEMENT

Petitioner is Vickie Lynn Marshall, a/k/a Anna Nicole Smith ("Vickie" or "Petitioner"), widow of the late J. Howard Marshall II ("J. Howard"). Respondent is E. Pierce Marshall ("Pierce" or "Respondent"), J. Howard's son.

Prior to J. Howard's death, Vickie commenced proceedings in the Texas probate court (the "Probate Court") challenging J. Howard's estate plan (the "Estate Plan"). As part of her challenge, she alleged that J. Howard intended to give her a gift worth tens of millions of dollars and that Pierce interfered. Following a five-month jury trial, the Probate Court validated the Estate Plan; concluded that J. Howard did not intend to give Vickie a gift; and dismissed Vickie's claim against Pierce.

During the probate proceedings, Vickie filed for bankruptcy in Los Angeles and there pursued the very claim against Pierce that she was already pursuing in the Probate Court. In both proceedings, Vickie styled her claim as one for tortious interference with an expectancy of a gift ("Vickie's Claim" or "Claim"). In a bizarre series of events, the bankruptcy court awarded Vickie $474 million on her Claim as a sanction for alleged discovery abuse that Pierce did not commit. The bankruptcy court thereafter enjoined further proceedings in the Probate Court. On appeal, the federal district court vacated the bankruptcy court's $474 million award and reversed its injunction. Thereafter, the Probate Court entered its judgment, as discussed above.

After the Probate Court entered its judgment, the district court, purporting to exercise bankruptcy jurisdiction, held further proceedings and concluded, directly contrary to the prior probate judgment, that J. Howard's Estate Plan was invalid and that Vickie was entitled to $89 million on her Claim. The Ninth Circuit vacated the district court's judgment and directed the dismissal of Vickie's Claim, concluding that the bankruptcy and district courts lacked jurisdiction to adjudicate Vickie's Claim

under the "probate exception" to federal jurisdiction (the "Probate Exception").

To succeed on her Claim against Pierce, Vickie had to establish a legitimate expectancy of a gift from J. Howard. After all, if J. Howard never intended to give Vickie a gift, then Pierce could not possibly have interfered. Under Texas law, the Probate Court had exclusive jurisdiction to determine whether J. Howard intended to give Vickie a gift as part of its probate function of determining all claims to the decedent's property, whether based on a theory of gift, bequest, or otherwise. The bankruptcy and district court's adjudication of J. Howard's intentions concerning the disposition of his assets unquestionably usurped the Probate Court's exclusive jurisdiction to resolve this issue.

Vickie also had to establish that the Estate Plan was invalid. If the Estate Plan directing the distribution of J. Howard's property to persons other than Vickie was valid, then Vickie's Claim was foreclosed because Texas law does not allow a cause of action for an alleged expectancy of property contrary to a validated estate plan. The validity of the Estate Plan, however, also is a question within the exclusive jurisdiction of the Probate Court. Once again, the bankruptcy and district court's adjudication of the validity of the Estate Plan usurped the Probate Court's exclusive jurisdiction.

The Probate Exception exists precisely to prevent such interference. In reaching its conclusion that the Probate Exception applies, the Ninth Circuit simply followed this Court's precedents, and its decision does not conflict with the decisions of any other court of appeals. Vickie's Claim also is otherwise barred as a matter of law by the doctrines of *res judicata* and collateral estoppel, owing to the Probate Court's prior judgment disposing of Vickie's Claim. This case thus presents no occasion for certiorari review and the Petition should be denied.

STATEMENT OF THE CASE

J. Howard and Vickie were married in 1994, when he was eighty-nine and she was twenty-six. ER[1] 95, 2420. J. Howard died fourteen months later. ER 95. During his lifetime, J. Howard gave Vickie gifts worth in excess of $6 million, paying for them largely with borrowed funds. He made no provision for Vickie in his Estate Plan and left most of his remaining assets (as well as substantial debts) to Pierce. Vickie claims that, contrary to the terms of his Estate Plan, J. Howard intended to give her a gift worth tens of millions of dollars and that Pierce should be liable for J. Howard's failure to do so.

In 1982, long before he met Vickie, J. Howard began conveying and transferring most of his property to a living trust established under a written trust instrument (the "Trust"). ER 1018, 2623. From 1982 until his death, J. Howard executed a series of amended and restated trust instruments governing the terms of the Trust. ER 131, 1453-55. J. Howard's principal goal in creating the Trust was to provide a mechanism for the distribution of his property upon his death. ER 5004-05. Each trust instrument identified the beneficiaries who would receive J. Howard's property after his death. ER 131, 146, 225, 261-62, 264, 289, 352, 392, 510, 528, 644.

J. Howard retained the beneficial interest in the Trust during his lifetime and received income derived from the Trust's assets. ER 146, 225, 528, 644, 789, 5268. J. Howard kept all of his assets in the Trust and, from time to time, trust assets were exchanged and transferred for estate-planning purposes. ER 1018, 2623. On July 13, 1994, two weeks after he married Vickie, J. Howard executed his final amended and restated Trust

---

[1]The term "ER" refers to certain "excerpts of record" filed in the Ninth Circuit pursuant to that court's local rules.

instrument, fixing the terms of the Trust. ER 3264-3268. J. Howard made no provision in the Trust for Vickie.

J. Howard also left a series of wills. ER 131, 264, 510, 819, 4712. His last will (the "Will"), like all of his previous wills after 1982, was a "pourover" will, meaning that it left all of his property not already in the Trust to the Trust to be distributed after his death in accordance with the Trust's terms. ER 510, 514-16. As a result, the Trust, rather than the Will, held all of J. Howard's assets and specified how his property would be distributed upon his death. The Trust is thus what is known as a "will substitute." The Trust and the Will are collectively referred to herein as the "Estate Plan."

At no time did J. Howard ever make Vickie a beneficiary under his Will or Trust (other than with respect to certain real estate that he ultimately transferred to her out of the trust shortly after their marriage); nor did he add her as a beneficiary. ER 95, 510, 647-51, 819, 1018, 2498, 2633. There are no drafts of either document that name Vickie as a beneficiary. Pierce did not destroy, alter, or suppress any document purporting to reflect, provide, or establish any gift to Vickie, and there is no evidence to substantiate Vickie's unfounded claim that he did. In fact, the evidence establishes that J. Howard never intended to give Vickie the gift that she asserts, as conclusively found by the only court with jurisdiction to decide this matter: the Texas Probate Court.

The Probate Proceedings

In the Texas probate proceedings that Vickie herself initiated -- a fact omitted from the Petition -- Vickie challenged the Estate Plan on various grounds, including that J. Howard intended to give her a multi-million dollar gift and that Pierce tortiously interfered with her expectancy of this alleged gift (the

"Probate Case").[2] Vickie's Claim is inconsistent with, and strikes at the heart of, the Estate Plan. Because J. Howard kept all of his assets in the Trust, it is simply not possible that he could have made a gift to Vickie worth tens of millions of dollars other than from the Trust. As a matter of law and logic, either J. Howard intended that his assets would be used and distributed as set forth in the Trust, or he intended some other disposition that included a gift to Vickie. Both cannot be true.

J. Howard's intent with regard to the disposition of his assets is a critical element of Vickie's Claim: If J. Howard never intended to give Vickie a gift, then it is not possible that Pierce interfered and, thus, Vickie has no claim against Pierce. So too, J. Howard's intent concerning the disposition of his assets was the essential focus of the Probate Case: The whole point of the Probate Case was to determine J. Howard's true intentions regarding the disposition of his property -- whether through an uncompleted *inter vivos* gift (as Vickie claims), or distributions from the Trust to named beneficiaries (as the Estate Plan provides), or otherwise -- and to sort out all of the competing claims to those assets, regardless of the theory of the claims.

The Texas Probate Code mandates that Texas probate courts have exclusive jurisdiction over "any cause of action

---

[2]Vickie commenced proceedings in the Probate Court in April 1995, several months prior to J. Howard's death, seeking a declaration concerning the Trust's validity, ER 5620, and alleging that Pierce had tortiously interfered with her property rights with respect to J. Howard's assets, ER 5615-17. Three days after J. Howard died, Vickie filed a further application in the Probate Court, seeking a declaration that J. Howard had died intestate. ER 816-18. Pierce opposed this application and sought to admit his father's Will into probate. ER 836-45. Vickie thereafter contested the Will in the Probate Court, ER 5523-31, and later challenged the validity of the Estate Plan and pursued her Claim against Pierce in the Probate Case, ER 1319-31, 2863-65.

appertaining to estates or incident to an estate." TEX. PROB. CODE ANN. §§ 5, 5A, & 5A(b) (Vernon 1999)[3] (all such causes of action "shall be brought in a statutory probate court rather than in the district court"). A matter "appertains" to or is "incident" to an estate if it involves a matter "relating to the settlement, partition, and distribution of estates of deceased persons." *Id.*, § 5A(a). This includes all "claims" to the decedent's assets. *Id.* In each of her petitions in the Probate Court, Vickie asserted that the Probate Court was vested with general probate jurisdiction to hear and decide all of her claims, including her claim that J. Howard intended to give her a gift and that Pierce interfered, styled as a claim for tortious interference with an expectancy of a gift. ER 2842, 2862-65.

During its five-month jury trial, the Probate Court heard the testimony of over forty witnesses and received hundreds of items of evidence. ER 4066-71, 4706-27. On August 15, 2001, the Probate Court entered its final judgment, disposing of all claims and issues related to J. Howard's intended disposition of his property, including Vickie's Claim. ER 4001. On December 7, 2001, the Probate Court entered its second amended final judgment (the "Probate Judgment"). ER 4706. The Probate Court admitted J. Howard's Will to probate, finding the Will and Trust to be genuine and valid and not the product of improper conduct. ER 4714-15, ER 4717.

With respect to Vickie, the Probate Court concluded that it had "exclusive" jurisdiction under Texas law over Vickie's claims and rights, including any claim regarding "the making of any *inter vivos* or testamentary gift or transfer by [J. Howard] of any of his property." ER 4712. The Probate Court further determined that any and all claims by Vickie regarding J. Howard and his property, "including but not limited to claims

---

[3]Although the Texas Probate Code has since been amended, the 1999 version applies here.

that [J. Howard] intended but failed to give her or to leave her any portion of such property during his life or upon his death, were required by law to have been asserted as compulsory counterclaims in this proceeding." ER 4720-21. The Probate Court specifically ruled that "[J. Howard] did not intend to give and did not give to [Vickie] a gift or bequest from the Estate of [J. Howard] or from the [Living Trust] either prior to or upon his death" and "that [Vickie] does not possess any interest in and is not entitled to possession of any property within the Estate of [J. Howard] or any property [of the Trust] because of any representations, promises, or agreements." ER 4721. The Probate Court also held that (1) all of Vickie's claims were resolved and dismissed; (2) Vickie was entitled to "take nothing" from Pierce; and (3) Pierce was entitled to his inheritance free and clear of any claim by Vickie. ER 4718-19, ER 4721.

Others challenged the validity of the Estate Plan, and the Probate Court's statutory mandate was to resolve all challenges in order to determine the proper disposition of J. Howard's assets. Indeed, unless and until the court did so, it could not determine whether, among other things, J. Howard's assets should go to satisfy Vickie's Claim, or, instead, to fund J. Howard's bequests under the terms of his Estate Plan. While Vickie contends that her claims in this case do not involve J. Howard's Estate Plan and do not touch upon the Probate Court's function or the issues that the Probate Court was required to resolve, Pet. 7-10, 17-18, this is obviously untrue. As the Probate Court explained:

> A complaint was filed with respect to the will [J. Howard] signed in 1979, and every transaction he undertook after that, every Trust he set up, every transaction, every gift he made, every conveyance he made, all of those were challenged. They are all before the Court. . . .
>
> So the point is I am not limited to what was in the Estate on the date of death. This is a will contest. If the wills

> had been set aside, if the Trust had been set aside, then it all would have been back in his Estate. That's what you were trying to do until you nonsuited in January. That's what [J. Howard's other son] was trying to do through the verdict, was to get all of that set aside and put back in the Estate so all of that would be in the Estate.

SER[4] 8665.

Under Texas law, once a probate court validates an estate plan, all claims and causes of action based on expectancies contrary to the plan are foreclosed. *Thompson v. Deloitte & Touche*, 902 S.W.2d 13, 16 (Tex. App. 1995) (probate judgment establishing validity of decedent's intended scheme of distribution precludes tortious interference claim based on expectancy of a different distribution); *Neill v. Yett*, 746 S.W.2d 32, 35 (Tex. App. 1988) (same). Any party who wishes to pursue a claim based on an unfulfilled expectancy of property is required to pursue the claim in the probate court, or be forever barred from doing so. The Probate Court explained to Vickie:

> Your claim to anything that [J. Howard] had at any time in his life is over when this final judgment is signed. The fact that the Rules of Civil Procedure allow you to take a nonsuit and re-file later doesn't really apply in Probate Court when we're talking about who is entitled to an Estate. Once I decide who is entitled, you can't wait until that's all over with and then say, "Okay. Now I can come in and file my claim."

SER 8661. The Probate Court stated further:

---

[4]The term "SER" refers to "supplemental excerpts of record," filed with the Ninth Circuit.

> I am not going to leave open any question . . . of what . . . he had and what he did with it and whether that was proper or improper. All of that was before the Court. [J. Howard's other son] complained of every transaction that was done since 1979. Every transaction in connection with his estate plan was before this Court, and all of those transactions were found to be valid by the jury, and the Court is going to find them to be valid.

SER 8663.

The Bankruptcy Proceedings

On January 25, 1996, during the Probate Case, Vickie filed a bankruptcy case in Los Angeles. ER 2642. On June 14, 1996, Vickie asserted in the federal bankruptcy court the same Claim against Pierce that she had raised in the Probate Court -- that J. Howard intended to give her a gift worth tens of millions of dollars and that Pierce interfered. Pierce moved to dismiss Vickie's Claim for lack of subject matter jurisdiction, arguing that the Probate Court had exclusive jurisdiction over Vickie's Claim and that the Probate Exception barred federal jurisdiction over the Claim. The bankruptcy court denied the motion.

Following a press conference at which the presiding judge invited the media in open court to ask the judge questions about the case (which they did and which he answered), the bankruptcy court conducted a series of hearings on Vickie's Claim. At these hearings, the court severely circumscribed Pierce's presentation of evidence and made findings of fact adverse to him as an unfounded sanction for alleged discovery abuse that Pierce never committed and that was never proven. ER 2173-75, 8641-49. These sanctions effectively resolved Vickie's Claim in her favor. The bankruptcy court entered its initial sanctions order on February 2, 1999 (the "Initial Sanctions Order"), which deemed various matters to be established for purposes of resolving Vickie's Claim, including that J. Howard

intended to leave her a substantial inheritance and that Pierce had tortiously interfered with Vickie's rights. ER 2172-74.

In September 1998, Pierce moved to withdraw the case to the district court. ER 2019. On October 19, 1998, the district court (Keller, J.) withdrew the matter, but left the bankruptcy court free to resolve pending discovery disputes. ER 2038-39, 2043. Judge Keller remarked at the hearing: "As I view this case overall, . . . essentially we are talking about a probate lawsuit here. Okay? And this should be resolved . . . in the Probate Court in Texas." ER 2036-37.

On January 12, 1999, the bankruptcy court stated that it intended to submit a secret memorandum (the "Secret Memo") to the district judge "to assist in his review of the matter," and that the Secret Memo would not be available to Pierce. Jan. 12 Hrg. Tr. at 5, T1017-18, 1023, 1034. The Secret Memo has never been disclosed. ER 2207-08.

The district court vacated the Initial Sanctions Order as lacking evidentiary support and remanded. ER 2211, 5744-49. Acknowledging receipt of the Secret Memo, the court also vacated its prior withdrawal of the case, sending it back to the bankruptcy court. ER 5744-49. On May 20, 1999, the bankruptcy court re-imposed its sanctions in a form virtually identical to the vacated Initial Sanctions Order (the "Final Sanctions Order"). ER 2235-39. The bankruptcy court never conducted an evidentiary hearing to establish Pierce's alleged discovery abuse; nor did any witness ever testify as to the alleged abuse. The court simply accepted the unsubstantiated, untrue, and contested accusations of Vickie's counsel.

On September 27, 2000, the bankruptcy court issued a decision concluding that Vickie had an expectancy of an inheritance, based on a "widow's election" theory that Vickie never argued or briefed, and awarding Vickie $449,754,134. On October 6, 2000, the bankruptcy court *sua sponte* issued a revised opinion, in which the court abandoned its "widow's

election" theory and deemed that Vickie had an expectancy of a substantial portion of J. Howard's wealth. Pet. App. 215. Concluding on the basis of presumed facts that Pierce interfered with this expectancy, the court again awarded Vickie $449,754,134, calculated, in part, on the court's view of the increase in the price of oil. Pet. App. 219-21. This calculation was arbitrary, as J. Howard did not receive any significant portion of his income from oil production and there was no evidence that any increase in the price of oil generated any income to him. On November 21, 2000, the bankruptcy court assessed punitive damages against Pierce in the amount of $25 million, and on December 29, 2000, entered judgment in Vickie's favor in the total amount of approximately $474 million (the "Bankruptcy Judgment"). Pet. App. 44. At Vickie's request, the bankruptcy court also enjoined ongoing proceedings in the Probate Court.

The District Court Proceedings

Pierce appealed the Bankruptcy Judgment to the district court (Carter, J.), which vacated the Bankruptcy Judgment on June 20, 200, and reversed the bankruptcy court's injunction on August 13, 2001. ER 3989. Thereafter, the Probate Court entered its Probate Judgment validating the Estate Plan; concluding that J. Howard did not intend to give Vickie a gift; and dismissing Vickie's Claim. Pierce then moved in the district court to dismiss Vickie's Claim on the grounds that it was barred by the doctrines of claim and issue preclusion. The court denied the motion and also affirmed the bankruptcy court's determination that the Probate Exception did not bar federal jurisdiction over Vickie's Claim. Asserting its own bankruptcy jurisdiction, the district court conducted a "*de novo*" review of Vickie's claim. The court refused to hear many of Pierce's percipient witnesses, but heard all of Vickie's witnesses. The district court awarded Vickie $88,585,534.66 on her Claim (the "District Court Judgment"), concluding that J. Howard's signature on the Trust was forged; that the Estate Plan did not reflect J. Howard's true intentions; and that Pierce had thwarted

J. Howard's intent to give Vickie an alleged gift by engaging in illegitimate "estate planning transactions for J. Howard." Pet. App. 78-147. The district court did not reach the issue of whether Pierce committed discovery abuse and declined to consider the bankruptcy court's sanctions rulings.

The Decision of the Court of Appeals

In vacating the District Court Judgment, the Ninth Circuit first held that the Probate Exception applies in bankruptcy cases. Pet. App. 26. In doing so, the court relied on *Harris v. Zion Sav. Bank & Trust Co.*, 317 U.S. 447 (1943), in which this Court applied the Probate Exception to bar the exercise of bankruptcy jurisdiction over a decedent's property. As the Ninth Circuit observed, no court of appeals has held that the Probate Exception does not apply in bankruptcy cases.

Second, the Ninth Circuit concluded that "[t]he reach of the probate exception encompasses not only direct challenges to a will or trust, but also questions which would ordinarily be decided by a probate court in determining the validity of the decedent's estate planning instrument." Pet. App. 29. The court observed that "[s]uch questions include fraud, undue influence upon a testator, and tortious interference with the testator's intent." *Id.* In reaching this conclusion, the Ninth Circuit relied on this Court's decision in *Sutton v. English*, 246 U.S. 199 (1918), in which the Court applied the Probate Exception after construing Texas probate law as bestowing exclusive jurisdiction on a Texas probate court to determine a claim of undue influence. The Ninth Circuit's application of *Sutton* is consistent with the decisions of other courts of appeals.

Third, the Ninth Circuit concluded that the district court's determination that J. Howard intended to give Vickie a gift and that the Trust was invalid conflicted with the Probate Judgment and interfered with the Probate Court's exclusive jurisdiction under Texas law to decide these issues. Pet. App. 30-32. The court reasoned that "[a]lthough [Vickie] styles her

action as a tort action, it is clear that the exercise of federal jurisdiction would, and, in this case, did interfere with the Texas probate court proceedings." Pet. App. 31. Stating that the form of Vickie's claim was not controlling, the court observed: "When the district court entered a judgment in favor of [Vickie] in the form of a damage award based on what the court thought she should have received from [J. Howard's] estate, the power of the Texas probate court was negated." Pet. App. 32. The Ninth Circuit's decision is consistent with the decisions of other courts of appeals on the same point. Pet. App. 31-32.

Fourth, the Ninth Circuit rejected Vickie's contention that the Probate Exception does not apply because J. Howard's principal estate planning instrument is a trust rather than a will, recognizing that a living trust is a "will substitute" and that the Trust "not only controlled the distribution of [J. Howard's] property during his lifetime, but also provided for the post mortem disposition of trust property." Pet. App. 33. This conclusion is consistent with this Court's decision in *Princess Lida of Thurn & Taxis v. Thompson*, 305 U.S. 456 (1939), upholding the exclusive jurisdiction of a state probate court to resolve matters arising out of a trust, and in accord with the decisions of other courts of appeals. Pet. App. 33.

Finally, the Ninth Circuit rejected Vickie's argument that the Probate Exception does not apply because Vickie's Claim alleges interference with an *inter vivos* gift, rather than a testamentary gift. Because Vickie never received the gift she alleges, under Texas law, she held, at most, a claim for an unfulfilled expectancy of a gift. The Ninth Circuit recognized that, in order to fulfill its probate function of dividing a decedent's property among competing claimants, "the state probate court must have exclusive *in rem* jurisdiction over all claims either against or on behalf of the decedents estate" whether based on "a theory of tax liability, debt, gift, bequest, tort, or any other theory." Pet. App. 34. The court concluded that Vickie could not escape the Probate Court's exclusive *in rem* jurisdiction by crafting her gift claim as a tort action, and

that she is bound by the procedures and restrictions of Texas law. Pet. App. 35-36. This ruling is likewise in conformity with the decisions of other courts of appeals.

REASONS FOR DENYING THE PETITION

The decision below follows this Court's precedents mandating that the touchstone for application of the Probate Exception is interference with a probate court's jurisdiction over functions assigned to it under applicable state law. Moreover, as this Court has determined, the Probate Exception applies in bankruptcy, and likewise bars federal jurisdiction over an undue influence claim that, under Texas law, must be adjudicated in a Texas probate court.

The decision below does not conflict with the holding of any other court of appeals. The Petition attempts to create a conflict where one does not exist by conflating very different cases that have decided very different issues. In applying the Probate Exception, courts routinely consider two key issues: (1) the substance (versus the form) of the particular claim presented in federal court; and (2) the nature and scope of the particular state probate system in question. Because different states have different probate systems; assign different functions to their probate courts; and recognize different kinds of probate claims, some claims that must be brought in the probate courts in some states need not be brought in the probate courts in others. The interference analysis required under the Probate Exception thus varies depending on these considerations. Unlike other states, Texas has an exceptionally comprehensive probate system and no court of appeals considering such a system has held that the Probate Exception does not apply to claims such as Vickie's Claim.

The Ninth Circuit's decision is also correct. In considering whether federal adjudication of a particular claim impermissibly interferes with probate jurisdiction, courts consider whether resolution of the claim would (1) require the

federal court to probate a will or administer an estate; (2) interfere with the probate court's determination of substantive issues that the probate court must resolve in performing its essential probate functions under state law; (3) require the federal court to assume jurisdiction in derogation of the probate court's exclusive jurisdiction over certain matters; or (4) interfere with the probate court's custody of property within its control. Consistent with the decisions of other courts of appeals, the Ninth Circuit properly concluded that the Probate Exception applies in this case because federal adjudication of Vickie's Claim would contravene the second and third factors.

This case does not present a proper vehicle for certiorari review in any event because, even if the Probate Exception did not apply, Vickie's Claim is barred by the doctrines of *res judicata* and collateral estoppel. Accordingly, the Petition should be denied.

A. The Decision Below Comports With This Court's Precedents.

For nearly two hundred years, this Court has repeatedly enforced the Probate Exception, holding that federal courts, including bankruptcy courts, lack subject matter jurisdiction over probate matters and may not interfere with the administration of probate cases. *E.g.*, *Markham v. Allen*, 326 U.S. 490, 494 (1946); *Harris*, 317 U.S. at 450; *Sutton*, 246 U.S. at 205; *Farrell v. O'Brien*, 199 U.S. 89, 114-16 (1905); *Byers v. McAuley*, 149 U.S. 608, 619 (1893); *In re Broderick's Will*, 88 U.S. 503, 515-20 (1874); *Armstrong v. Lear*, 25 U.S. 169, 175-76 (1827). "[O]ccasional departures from the rule are always carefully placed on such special grounds that they tend rather to establish than to weaken its force." *Broderick's Will*, 88 U.S. at 510.

1. Texas probate law and Vickie's Claim

Under Texas law, "any cause of action appertaining to estates or incident to an estate shall be brought in a statutory

probate court rather than in the district court." TEX. PROB. CODE ANN. § 5A(b); *see In re Graham*, 971 S.W.2d 56, 59 (Tex. 1998); *Bailey v. Cherokee County Appraisal Dist.*, 862 S.W.2d 581, 585-86 (Tex. 1993); *Perfect Union Lodge of San Antonio v. Interfirst Bank of San Antonio*, 748 S.W.2d 218, 221 (Tex. 1988); *English v. Cobb*, 593 S.W.2d 674, 676 (Tex. 1979). A matter "appertains" or is "incident" to an estate if it involves a matter "relating to the settlement, partition, and distribution of estates of deceased persons," including all "claims" to the decedent's assets. TEX. PROB. CODE ANN. § 5A(a); *Bailey*, 862 S.W.2d at 585. These concepts are construed broadly: "An action is 'incident or appertaining' to an estate when the outcome will have a direct bearing on the assimilation, collection, and distribution of the decedent's estate." *Falderbaum v. Lowe*, 964 S.W.2d 744, 747 (Tex. App. 1998).

Texas has a comprehensive probate system. TEX. PROB. CODE ANN. §§ 1 *et seq.*; *Sutton*, 246 U.S. at 207-08; *Graham*, 971 S.W.2d at 59; *Bailey*, 862 S.W.2d at 586; *Perfect Union Lodge*, 748 S.W.2d at 221; *In re Ramsey*, 28 S.W.3d 58, 62-63 (Tex. App. 2000); *Pullen v. Swanson*, 667 S.W.2d 359, 362 (Tex. App. 1984). The Texas probate court is the exclusive forum to determine all unsatisfied expectancies of, or claims to, a share of the decedent's property -- whether based on a theory of debt, gift, or bequest -- because, until the court does so, it cannot conclusively resolve the proper distribution of the decedent's assets. *Bailey*, 862 S.W.2d at 586 (tax claim); *Swanson*, 667 S.W.2d at 362 (promissory note). The Texas probate court also has the power to protect its exclusive jurisdiction by transferring cases to its own docket. TEX. PROB. CODE ANN. § 5B.

Texas probate courts generally have concurrent jurisdiction with other state courts over "all actions involving an *inter vivos* trust." TEX. PROB. CODE ANN. §§ 5(e) & 5A(c)(2). However, "[i]n situations where the jurisdiction of a statutory probate court is concurrent with that of a district court, any cause of action appertaining to estates or incident to an estate shall be brought in a statutory probate court rather than in the district

court." *Id.*, § 5A(b). Thus, any matter involving an *inter vivos* trust that is also "incident" to an estate or "appertaining" to an estate lies within the probate court's exclusive jurisdiction. *Id.*, § 5(d) (all applications, petitions and motions regarding "probate" must be filed and heard in a probate court); *Perfect Union Lodge*, 748 S.W.2d at 221 (probate court had jurisdiction over decedent's trust governing the disposition of his assets).

Texas probate proceedings are actions *in rem*, binding on all persons unless set aside in the manner provided by law. *Mooney v. Harlin*, 622 S.W.2d 83, 85 (Tex. 1981); *Ladehoff v. Ladehoff*, 436 S.W.2d 334, 336 (Tex. 1968). Texas courts have consistently refused to allow a litigant to sue in tort for interference with the expectancy of an inheritance where the decedent's will is upheld in probate court. *Thompson*, 902 S.W.2d at 16; *Yett*, 746 S.W.2d at 35. Moreover, "the facts involved and the relief requested are determinative as opposed to the label by which the claim is called. Simply put, the substance of what is pled controls, not the label or name appended to the claim." *Tri-State Chems., Inc. v. Western Organics, Inc.*, 83 S.W.3d 189, 194 (Tex. App. 2002).

Implicitly acknowledging the need to present her Claim in the Probate Court, Vickie herself commenced the Probate Case and there pursued her Claim as both a tort action against Pierce and a suit to set aside J. Howard's Estate Plan. The Probate Court exercised its exclusive jurisdiction, ruling that J. Howard did not intend to give Vickie a gift and that the Estate Plan was not tainted by misconduct of anyone, including Pierce. ER 4714-15, 4717, 4721. The Probate Court's validation of the Estate Plan foreclosed all claims based on expectancies of property not validated in the Probate Judgment. *Thompson*, 902 S.W.2d 13 at 16; *Yett*, 746 S.W.2d at 35. Having commenced the Probate Case, Vickie cannot contend that she is immune from the outcome. *Broderick's Will*, 88 U.S. at 509-19; *Maxfield v. Terry*, 885 S.W.2d 216, 219 (Tex. App. 1994). Even if she had not participated, she is bound by the Probate Judgment validating the Estate Plan. *Ladehoff*, 436 S.W.2d at 336.

Vickie's contention that she is not attacking the Estate Plan but merely asserting a tort claim is disingenuous. As noted, the alleged gift had to come from somewhere, and the Trust is the only source because J. Howard kept all of his assets there. Either J. Howard intended to distribute all of his property to persons other thar Vickie (in which case she has no claim of any kind), or he intended to give Vickie the gift that she claims. A decedent can have only one legally valid set of intentions regarding the disposition of his assets, and that is the set validated by the probate court's judgment, which forecloses any claim based on a contrary expectation.

While Vickie contends that she challenges Pierce's conduct in transferring property to and from the Trust to prevent J. Howard from making a gift to her, this argument is baseless and was resolved against her in the Probate Case. More important, under Texas law, the question whether anyone improperly transferred a decedent's property before the decedent's death also is a probate matter. *Cobb*, 593 S.W.2d at 676; *Ramsey*, 28 S.W.3d at 64. If any property was improperly transferred from the Trust, that property was recoverable in the Probate Case for the benefit of all those holding legitimate claims to J. Howard's assets. Accordingly, that issue was properly for the Probate Court to decide.

2. The decision below comports with *Sutton* and *Markham*.

This Court previously construed the Probate Exception in the specific context of Texas probate jurisdiction in *Sutton v. English*, 246 U.S. 199 (1918), a dispute that purportedly concerned title to real estate but required consideration of a decedent's intentions concerning the distribution of her property. In *Sutton*, the Court explained that federal jurisdiction does not extend to matters "incidental or ancillary to the probate" or to "questions relating to the interests of heirs, devisees, or legatees, or trusts affecting such interests," that may not be determined "without interfering with probate or assuming general

administration." 246 U.S. at 205 (citations omitted). In holding that the federal court lacked jurisdiction, the Court considered the nature and extent of the jurisdiction of Texas courts with respect to probate matters. *Id.* at 205-07. Recognizing that, under Texas law, the probate court had exclusive jurisdiction over matters incidental to the administration of estates, the Court applied the Probate Exception to protect the exclusive jurisdiction of the Texas probate court to resolve issues of undue influence. *Id.* at 207-08. *Sutton* controls here and the Ninth Circuit's decision clearly comports with it.

To create an argument that the Ninth Circuit's decision exceeds the scope of the Probate Exception as set forth in *Markham v. Allen*, 326 U.S. 490 (1946), Vickie misrepresents *Markham* and improperly limits it scope, erroneously stating that, under *Markham*, the Probate Exception "is violated only when a federal court probates a will or distributes estate assets." Pet. 11. No such statement appears in *Markham* or in any other decision of this Court.

In *Markham* -- a federal-question case concerning the wartime substitution of the United States for certain foreign national beneficiaries of an estate -- this Court held that federal courts may entertain suits to establish claims against a decedent's estate "***so long as*** the federal court does not interfere with the probate proceedings or assume general jurisdiction of the probate or control of the property in the custody of the state court." 326 U.S. at 494 (emphasis supplied). Critically, *Markham* did not involve federal-court adjudication of either the validity of the decedent's estate plan or questions concerning the decedent's intent. 326 U.S. at 495-96. Instead, the role of the federal court was limited to merely substituting the United States for certain foreign beneficiaries, pursuant to a federal statute, after the probate issues had been resolved. Thus, the federal court had no occasion to address any substantive probate matters.

In *Markham*, the Court found that the Probate Exception did not apply because there was no interference with the probate

court's probate function. The instant controversy, of course, is quite different. Vickie's Claim requires the court to determine J. Howard's intended distribution of his assets. Although Vickie labels her Claim as one in tort, she was required by Texas law to bring her Claim as part of the Probate Case resolving all controversies concerning J. Howard's intended distribution of his assets. Here, the lower federal courts adjudicated the validity of the Estate Plan and estate-planning transactions and whether J. Howard intended to give Vickie a large gift contrary to his Estate Plan. The decision below correctly concluded, fully consistent with *Markham*, that, "[a]lthough Vickie . . styles her action as a tort action, it is clear that the exercise of federal jurisdiction would and, in this case, did interfere with the Texas probate court proceedings." Pet. App. 31.

The framework set forth in *Moser v. Pollin*, 294 F.3d 335, 340-45 (2d Cir. 2002), adopted and applied by the Ninth Circuit in this case, derives directly from, and is fully consistent with, the principles enunciated in *Sutton* and *Markham*. As noted, under *Moser*, courts look at several factors to determine whether federal adjudication of a claim would impermissibly interfere with a probate court's jurisdiction, specifically considering whether resolution of the claim would (1) require the federal court to probate a will or administer an estate; (2) interfere with the probate court's determination of substantive issues that the probate court must resolve in performing its essential probate functions under state law; (3) require the federal court to assume jurisdiction in derogation of the probate court's exclusive jurisdiction over certain matters; and (4) interfere with the probate court's custody of property within its control. Pet. App. 27-28; *Moser*, 294 F.3d at 340.

In this case, the Ninth Circuit observed, *inter alia*, that "[t]he district court specifically determined that the trust was forged and was procured by fraud in direct and irreconcilable conflict with the Texas probate court's judgment," Pet. App. 30; "[t]he bankruptcy court's judgment was based specifically on [Vickie]'s interest in [J. Howard]'s estate," *id.*; "[t]he district

court's damages award is likewise based on the theory that property that was distributed from the trust estate . . . to [Pierce] should have been distributed to [Vickie] instead," *id.* at 31; the district court's damage award "negated" the power of the Texas probate court," *id.* at 32; and that, "when it granted damages 'in the amount that [J. Howard] intended to give her,'" the district court "bypassed" the trust terms held by the Probate Court to be valid, *id.* Consistent with *Markham* and *Sutton*, the Ninth Circuit correctly held that, "[b]y declaring that the trust was invalid, the bankruptcy and district courts directly interfered with the Texas probate court's administration of the decedent's estate." *Id.* at 33.

3. This Court has applied the Probate Exception in bankruptcy.

This Court has twice considered application of the Probate Exception in federal-question cases -- in *Markham* and in *Harris v. Zion Sav. Bank & Trust Co.*, 317 U.S. 447 (1943). If the Probate Exception does not apply in federal-question cases such as bankruptcy, one would expect the Court to have said so. But the Court has not said so. On the contrary, in *Harris* -- which Vickie mentions in a footnote -- the Court applied the Probate Exception to overturn a bankruptcy court's assertion of bankruptcy jurisdiction under an express statutory grant.

In *Harris*, the decedent farmer commenced a bankruptcy case before her death. After she died, the bankruptcy court abated (dismissed) her case. The administrator of the decedent's probate estate petitioned to revive her bankruptcy case to take advantage of provisions of the Bankruptcy Act that would have allowed the recovery of property previously taken from the decedent through foreclosure by the defendant bank. The Utah Supreme Court determined that the Utah probate code did not authorize a probate administrator to invoke bankruptcy procedures. 317 U.S. at 449. Nevertheless, the administrator pursued the bankruptcy case.

Section 75c of the former Bankruptcy Act expressly authorized the deceased farmer's representative to pursue bankruptcy on the decedent's behalf: "A [bankruptcy] petition may be filed by any farmer [seeking to reorganize its affairs through composition]." *Harris*, 317 U.S. at 449. Section 75r defined "farmer" to include "the personal representative of a deceased farmer." *id.* Section 8 of the Act expressly provided that the death of a bankrupt "shall not abate the proceedings, but shall be conducted and concluded in the same manner, so far as possible, as though he had not died." *Id.* at 454. In spite of these express statutory provisions, this Court affirmed dismissal of the case on the ground that allowing the case to proceed would interfere with the disposition of the decedent's property under Utah probate law. In reaching its conclusion, the Court recognized that Utah law did not authorize resort to a bankruptcy court for adjudication of matters involving the disposition of the decedent's property. The Court reasoned:

> When we reflect that the settlement and distribution of decedents' estates and the right to succeed to the ownership of realty and personalty are peculiarly matters of state law; that the federal courts have no probate jurisdiction and have sedulously refrained, even in diversity cases, from interfering with the operations of state tribunals invested with that jurisdiction, we naturally incline to a construction of . . . [section] 75 consistent with these principles.

317 U.S. at 450. The Court concluded: "The probate court, not the bankruptcy court, is the appropriate forum for weighing the respective benefits or detriments to those who share in the equity of the decedent's estate." *Id.* at 452.

Unlike the former Bankruptcy Act, no provision of the current Bankruptcy Code expressly provides that bankruptcy courts have jurisdiction over probate matters. But even if one did, *Harris* demonstrates conclusively that the Bankruptcy Code

cannot be construed to permit interference in probate affairs. The Probate Exception applies in bankruptcy.

4. Vickie's claim is not *inter partes* and the Probate Exception applies to her gift theory.

Vickie asserts that the Probate Exception does not apply because her tort claim is not directed at the Estate Plan but is an *inter partes* claim directed at an individual (Pierce) who received the benefit of the Estate Plan. Pet. 7-10, 17-18. Vickie's assertion that application of the Probate Exception turns on whether a claim may be labeled as *inter partes* is without merit.

A party cannot circumvent exclusive probate jurisdiction by artful pleading and, as numerous courts have found, including the Ninth Circuit in the decision below, the label a litigant uses in framing a claim is not controlling. *Moser*, 294 F.3d at 340-41; *Moore v. Graybeal*, 843 F.2d 706, 710 (3d Cir. 1988); *Dragan v. Miller*, 679 F.2d 712, 716-17 (7th Cir. 1982). Vickie seeks to recover in tort damages equal to the gift that she says represents her share of J. Howard's assets. But Vickie cannot seek indirectly in tort what she properly should have sought (and did seek unsuccessfully) in the Probate Court. *Storm v. Storm*, 328 F.3d 941, 947 (7th Cir. 2003); *Moser*, 294 F.3d at 340-41; *Moore*, 843 F.2d at 710; *see also McKibben v. Chubb*, 840 F.2d 1525 (10th Cir. 1988). This is a key point of *Sutton*, in which, as noted, the Court applied the Probate Exception to protect the exclusive jurisdiction of the Texas probate court to resolve issues of undue influence.

Moreover, as this Court has explained, an "action or suit *inter partes*" refers "only to independent controversies *inter partes*, and not to mere controversies which may arise on an application to probate a will because the state law provides for notice, or to disputes concerning the setting aside of a probate, when the remedy to set aside afforded by the state law is a mere continuation of the probate proceeding." *Farrell*, 199 U.S. at 110; *see id.* at 114-16 (where a proceeding to contest a will

under state law can only be heard before the court that admitted the will to probate, and where the relief in that proceeding operates as against the entire world and not just the parties before the court, it is not an action *inter partes*); *Sutton*, 246 U.S. at 207-08; *Waterman v. Canal-Louisiana Bank & Trust Co.*, 215 U.S. 33, 44 (1909) (no federal jurisdiction where the proceedings are *in rem* and are thus purely probate in character). Under Texas law, Vickie's suit is an integral component, and mere "continuation," of the Probate Case and not an independent *inter partes* suit. *See Sutton*, 246 U.S. at 205-06 (analyzing Texas probate law); *Farrell*, 199 U.S. at 111-14 (analyzing Washington probate law).

Vickie contends that the Probate Exception does not apply because her Claim involves an alleged *inter vivos* gift in the form of a trust that was supposed to have been created for her benefit, and that the Exception does not apply to gifts. Pet. App. 25-26. As the decision below correctly recognized, however, Vickie "cannot avoid the Probate Exception simply by stating that the trust which she claims was to be created [as a gift] for her benefit was an *inter vivos* trust." Pet. App. 33. As noted, Vickie did not actually receive her alleged gift before J. Howard died, and thus, under Texas law, her Claim fell within the exclusive jurisdiction of the Probate Court to determine all such claims involving J. Howard's property.

Finally, Vickie criticizes the decision below on the theory that the Ninth Circuit's decision "creat[es] a jurisdictional exception that has no statutory foundation" and constitutes an "extravagant extension." Pet. 22. On the contrary, the decision below correctly applies longstanding principles designed to preserve the integrity of probate proceedings within our federal system. This Court has long adhered to doctrines of federalism such as the Probate Exception, and the fact that they have not been codified by Congress does not mean that they are invalid. For example, this Court has long applied the similar Domestic Relations Exception, which proscribes federal court interference

in matters involving divorce, alimony, custody, and child support:

> One of the principal areas in which this Court has customarily declined to intervene is the realm of domestic relations. Long ago we observed that "[t]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States." So strong is our deference to state law in this area that we have recognized a "domestic relations exception" that "divests the federal courts of power to issue divorce, alimony, and child custody decrees."

Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 124 S. Ct. 2301, 2309 (2004) (citations omitted). Vickie's criticisms are thus misplaced and the Probate Exception applies.

B. The Decision Below Does Not Conflict With The Decisions Of Other Courts Of Appeals.

Vickie asserts that "the circuit courts have become profoundly split over the scope of the probate exception." Pet. 12. Review of the relevant decisions, however, demonstrates that this is not so.

First, Vickie's reliance on *Goerg v. Parungao (In re Goerg)*, 844 F.2d 1562 (11th Cir. 1988), in support of her contention that the decision below creates a circuit conflict concerning the applicability of the Probate Exception in bankruptcy is plainly misplaced. In *Goerg*, the Eleventh Circuit considered whether the foreign administrator of a foreign decedent's German estate could petition for relief under section 304 of the Bankruptcy Code, which does not authorize the commencement of a bankruptcy case but merely permits certain foreign representatives to initiate proceedings in the United States to exercise control over property owned by a foreign entity. The administrator in *Goerg* commenced such a

proceeding to take possession of property of the foreign decedent's United States estate. In contrast to the instant case, *Goerg* did ***not*** involve a conflict between federal law and any state probate procedures, nor any effort by a bankruptcy court to adjudicate matters subject to a probate court's exclusive jurisdiction. The Probate Exception was never at issue and the case was resolved on other grounds. The Ninth Circuit correctly recognizes that *Goerg* is inapposite and that the statement in *Goerg* regarding the Probate Exception is pure *dicta*. Pet. App. 25-26.

Second, the Ninth Circuit did not "reject" any of Vickie's cited cases in relying on the Second Circuit's analysis in *Moser*. The Ninth Circuit relied on *Moser* because of its analytical fidelity to *Markham*, in contrast to "[o]ther circuits [that] have considered the probate exception but justify their decisions without strict adherence to the doctrine as enunciated by the Supreme Court in *Markham*." Pet. App. 27 n.11. Vickie's classification of cases according to how closely (in her estimation) they follow *Markham* does not demonstrate an actual conflict but merely reveals that the analyses in the decisions are not identical. If circuit conflicts were determined in the manner that Vickie suggests, there would be a conflict on virtually every issue decided by the courts of appeals. Demonstration of an actual conflict requires more, such as specific analysis showing that the result in this case would be different under the decisions that Vickie cites.

Vickie also fails to analyze the cited decisions for their application of the factors that courts consider in determining whether the Probate Exception applies in the specific contexts of the different types of probate systems that exist from state to state. Obviously, this will vary considerably from one case to another, depending on the probate law of the state in question and the facts and claims at issue. This variability hardly means that there is "chaos" requiring this Court's intervention, as Vickie contends. It merely reflects the diversity of claims and

systems that courts must address in applying the Probate Exception.

For example, in *Golden v. Golden*, 382 F.3d 348 (3d Cir. 2004), the Third Circuit dismissed under the Probate Exception certain of the plaintiff's causes of action because hearing them in federal court would interfere with probate jurisdiction (e.g., claims for fraud and undue influence), but allowed others to proceed (e.g., claims for slander and interference with inheritance rights). The Third Circuit expressly stated that differences in the applicable state law accounted for the difference between the result in *Golden* and the results reached previously by the court in *Moore v. Graybeal*, 843 F.2d 706 (3d Cir. 1988), and by the Seventh Circuit in *Storm v. Storm*, 328 F.3d 941 (7th Cir. 2003). *See Golden*, 382 F.3d at 365-66 & n.18. Among other differences, Pennsylvania law recognizes a specific cause of action for interference with inheritance rights -- the claim at issue in *Golden* -- and treats it in a certain way within its legal system. In contrast, no Texas court has ever recognized a cause of action for tortious interference with an expectancy of a gift -- the claim that Vickie asserts -- and Texas law treats all claims involving expectations of property in its own unique way.

Similarly, the decision below does not conflict with *Mangieri v. Mangieri*, 226 F.3d 1 (1st Cir. 2000), in which the son of a decedent who was not included in the decedent's probated will sued the executor under the state omitted-child statute and for breach of fiduciary duty. Citing *Markham* and other circuit authority, the First Circuit held that the district court correctly dismissed the case, as it was properly within the probate court's jurisdiction and the relief requested would have required that the probate court's ruling that the son was intentionally omitted from the will be set aside. *Mangieri*, 226 F.3d at 3. Nor does the decision below conflict with *Breaux v. Dilsaver*, 254 F.3d 533 (5th Cir. 2001). As the Ninth Circuit recognized, the facts of *Breaux* differ materially from the instant case in that *Breaux* did not involve a determination of the

plaintiff's interests in the decedent's assets but rather a suit against an administrator for improperly handled funds. Pet. App. 31.

The decision also comports with *Lepard v. NBD Bank*, 384 F.3d 232 (6th Cir. 2004). *Lepard* upheld the trial court's ruling that the plaintiff's breach of fiduciary duty claim fell "squarely within the exclusive jurisdiction of the Michigan probate courts" and, therefore, was barred by the Probate Exception. 384 F.3d at 237-38. *Lepard* also affirmed the trial court's determination that claims for theft, abuse of power, and undue influence were barred because "[t]he probate exception applies both to purely probate matters, and to matters ancillary to probate in the practical sense that allowing the case to be maintained in federal court would impair the policies served by the probate exception" and these counts are "connected inextricably with the probate of the estates and other issues ancillary to probate." *Id.* (internal quotation marks, alterations, and citation omitted).

Nor is there any conflict between the decision below and *Storm v. Storm*, 328 F.3d 941 (7th Cir. 2003), a case virtually indistinguishable from this one. Indeed, the Ninth Circuit acknowledged that the facts of *Storm* were similar and followed *Storm* (and other cases) in focusing on the substance of Vickie's claim, rather than the label that Vickie attaches to it. Pet. App. 32. Like the decision below, *Storm* held that plaintiff's claim for interference with an expectancy of inheritance was "'in substance and effect' a will contest" under applicable state law and, therefore, an ancillary probate proceeding subject to the probate exception. 328 F.3d at 944-45.

McKibben v. Chubb, 840 F.2d 1525 (10th Cir. 1988), also provides no support for Vickie's claim of a circuit split. Among other things, *McKibben* affirmed the dismissal of claims of undue influence and fraud in connection with the execution of a will as claims that properly belonged in the probate court, holding that the adjudication of such claims would interfere with

the probate court's jurisdiction. 840 F.2d at 1529-30. *McKibben* also dismissed fraud claims involving a pre-death transfer of non-probate estate property on the ground that there was no fraud if the plaintiff did not have a legitimate prospective inheritance. *Id.* at 1531.

Finally, the decision below does not conflict with the Eighth Circuit's decision in *Sianis v. Jensen*, 294 F.3d 994 (8th Cir. 2002), to allow a challenge to an *inter vivos* trust to proceed in federal court, as *Sianis* is distinguishable from the instant case in several critical respects. First, as the Eighth Circuit concluded, "the district court's adjudication of the validity of the Trust under Nebraska law will not interfere with the prior probate proceeding." 294 F.3d at 999. In *Sianis*, the probate court asserted no jurisdiction over the trust's *res* or its administration during the pendency of the probate proceeding. *Id.* Moreover, no Nebraska authority suggested that plaintiff could have challenged the trust's validity in the probate case. *Id.* Under these circumstances, the Eighth Circuit concluded that plaintiff's claim that the defendants wrongfully induced the decedent into executing the trust instrument did not trigger the Probate Exception. *Id.*

In sum, the decision below does not conflict with the cases that Vickie cites and Vickie provides no basis from which to conclude that the result in this case would be different under these decisions.

C. Vickie's Claim Is Barred In Any Event.

Although the Ninth Circuit did not address Pierce's arguments on these points, Vickie's Claim is also barred by the doctrines of *res judicata* and collateral estoppel,. Because Vickie's Claim is obviously barred, irrespective of the scope and application of the Probate Exception, the result in this case must be the same, making it an inappropriate vehicle for certiorari review.

The doctrines of *res judicata* and collateral estoppel, applicable through 28 U.S.C. § 1738, protect the finality of prior judgments and judicial determinations. There can be no clearer illustration of the reasons for these doctrines than this case. As this Court has very recently explained:

> 28 U.S.C. § 1738 requires federal courts to give preclusive effect to any state-court judgment that would have preclusive effect under the laws of the State in which the judgment was rendered. . . . This statute has long been understood to encompass the doctrines of res *judicata*, or "claim preclusion," and collateral estoppel, or "issue preclusion." *See Allen v. McCurry*, 449 U.S. 90, 94-96 (1980).
>
> . . . .
>
> The general rule implemented by the full faith and credit statute -- that parties should not be permitted to relitigate issues that have been resolved by courts of competent jurisdiction -- predates the Republic. It "has found its way into every system of jurisprudence, not only from its obvious fitness and propriety, but because without it, an end could never be put to litigation." *Hopkins v. Lee*, 6 Wheat. 109 (1821).

San Remo Hotel, L.P. v. City & County of San Francisco, 125 S. Ct. 2491, 2499-500, 2501 (2005) (footnote omitted). Any Texas court would dismiss Vickie's Claim and, therefore, the lower courts were required to do the same in this case. *E.g.*, *Harrold*, 93 F. Supp. at 888-89 (applying Texas law in probate matter).

CONCLUSION

For the foregoing reasons, the Court should deny the petition for a writ of certiorari.

Respectfully submitted,

G. Eric Brunstad, Jr.
Counsel of Record
Rheba Rutkowski
Renee M. Dailey
BINGHAM MCCUTCHEN LLP
One State Street
Hartford, Connecticut 06103
(860) 240-2700

Thomas C. Goldstein
GOLDSTEIN & HOWE, P.C.
4607 Asbury Place, N.W.
Washington, DC 20016
(202) 237-7543

Attorneys for Respondent
E. Pierce Marshall

Dated: August 3, 2005